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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DEREK H. TAYLOR et al., Defendants and Appellants.	A122942 (San Francisco City & County Super. Ct. No. 205750)

Appellants Derek H. Taylor and Debra Ann Sangster were convicted after a joint jury trial of possession of methamphetamine for sale. Both appealed, each raising different and unrelated issues.

Taylor contends that he, or at least his trial counsel, should have been permitted to attend a pretrial hearing regarding whether the prosecution was obligated to disclose the identity of a confidential informant. He also contends that his rights were violated when, while he was handcuffed during a search of his apartment, a police officer asked him for the combination to a safe so the police could open and search it.

For her part, Sangster contends that her mid-trial motion to sever her case from Taylor's should have been granted. She also argues that during closing argument, the prosecutor improperly commented on her post-arrest silence and decision not to testify.

We reject all of the arguments raised by Taylor and Sangster on appeal, and affirm their convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND

A. The 2006 Search of Taylor's Apartment

Taylor relocated to San Francisco from another city in August 2005, and moved into a rented apartment. He was unable to find a job due to illness, and by December 2005, his financial situation had become very difficult. In early 2006, he took in a roommate, Ray Martinez, to help pay the rent. Martinez later arranged for Taylor to sell methamphetamine so Taylor could make some money while he was waiting to start receiving disability payments.

In October 2006, Martinez pressured Taylor into purchasing a larger than usual quantity of methamphetamine by threatening not to pay his share of the rent unless Taylor did as he asked. On October 26, 2006, the day after Taylor bought the methamphetamine, the police detained him a few blocks from his apartment, and brought him there to execute a search warrant. In Taylor's bedroom, they found a lock box with Taylor's initials on it, which contained identification materials for Taylor; several different scales; packaging material; and 83 grams of methamphetamine. The methamphetamine was packaged in plastic baggies that were hand marked with quantities, and printed with a design of a blue devil. A police expert opined at trial that the methamphetamine was possessed for sale.

Taylor admitted to the police that the methamphetamine found in his bedroom belonged to him. For reasons not apparent from our record, but which the parties do not argue are relevant to the issues raised on appeal, the charge arising from the search of Taylor's apartment on October 26, 2006 (the 2006 search) did not go to trial until August

2008.[1] At that time, it was consolidated with the charges arising from a second search of Taylor's apartment (the 2008 search), discussed in the next section.

B. The 2008 Search of Taylor's Apartment

Around February 2008, Sangster moved into Taylor's apartment as his roommate. In March or April 2008, Sangster had surgery to replace both her knees, and as a result, she had a number of caretakers over the next several months, some of whom stayed in the apartment's living room, and at least one of whom had a set of keys to the apartment. During this period, Taylor himself was substantially incapacitated due to his own illness, and spent most of his time in bed.

Taylor had installed a safe in the living room in 2007, to store personal belongings, including some videotapes he had produced. When some of Sangster's possessions disappeared, Taylor gave her permission to use the safe, as well as the combination, and told her how to change the combination, which he expected her to do; apparently, however, she did not change it.

On May 30, 2008, the police obtained another search warrant for Taylor's apartment, based on information provided by a confidential informant. This time, however, the target of their investigation was Sangster rather than Taylor.[2]

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[1] According to the probation report prepared for Taylor's sentencing, he was released due to his medical condition after his arrest on October 26, 2006, and the case was sent to the district attorney for review. Taylor was arrested again in January 2007, but released shortly thereafter. An information was filed on May 9, 2007, but the record does not indicate what occurred between then and May 2008. In any event, Taylor did not contend in the trial court, and does not argue on appeal, that his constitutional or statutory speedy trial rights were violated by the delay.

[2] Prior to trial, Taylor moved to disclose the informant's identity. At the portion of the hearing on that motion that was held in open court, the investigating officer testified that the informant told the officer that a man named Derek lived in the same apartment as Sangster, but did not say anything more about him. The officer was able to determine from police records, and from communications with other officers, that the person known to the informant as Derek was appellant Taylor, who lived at that address and had been involved in prior drug investigations.

When the police arrived to execute the warrant, they found Taylor in his bedroom with two other men; Sangster was not present, although she was still living there.[3] Taylor and the other two men were handcuffed and taken to the kitchen while the police searched the apartment, but were neither formally placed under arrest nor given *Miranda* warnings. (*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).)

In Sangster's bedroom, the police found a notebook containing pages of whole numbers, without decimals or fractions; the pages did not bear any names. A police officer with narcotics expertise testified at trial that the writing in the notebook was consistent with a "pay-owe sheet" that a drug trafficker would maintain. There were also two cell phones and some unmarked plastic baggies in Sangster's room, but no drugs, scales, or other drug paraphernalia. In Taylor's bedroom, however, the police found two scales, both of which had white powder residue on them. Taylor testified at trial that he used the scales to measure a hormone that he took to alleviate one of the symptoms of his illness, but when asked on cross-examination whether testing the scales would reveal traces of methamphetamine, he said he did not know.

The police found the safe in the living room locked, and asked Taylor and the other two men for the combination. When they did not respond, an officer said that he would force open the safe if necessary. At that point, Taylor revealed the combination, which he explained used the same numbers as his birth date.

Inside the safe, the police found some videotapes on top of a shelf that could be folded away to reveal another storage compartment underneath. In the compartment under the shelf, the police found a black wallet or pouch containing 17.35 grams of methamphetamine, and a total of $2,345 in cash divided among three envelopes. One of

[3] Contrary to the recollections of the prosecution's witnesses, Taylor testified at trial that Sangster was present during the search. The discrepancy is not relevant to any of the issues presented on appeal.

the envelopes had a notation written on it. which Taylor admitted at trial memorialized methamphetamine purchases he had made from Sangster.[4]

The methamphetamine found in the safe was in small baggies that differed from the unmarked ones found in Sangster's room, in that they had blue markings of a devil face on them, sometimes accompanied by a "swoosh" symbol like that used on Nike brand shoes. A police narcotics expert testified at trial that the methamphetamine in the safe was possessed for sale.

After the safe was opened, Taylor was arrested. When he was booked at the jail, he was found to be in possession of $460 in cash. Taylor testified at trial that he had not opened the safe since showing Sangster how to do so in February; was not aware that the methamphetamine and cash were in the safe; did not know whose they were; and had never seen Sangster sell methamphetamine.

C. Charges and Relevant Procedural History

On May 9, 2007, based on the facts relating to the 2006 search, Taylor was charged by information with possession of methamphetamine for sale in violation of Health and Safety Code section 11378. As already noted (fn. 1, *ante*), our record does not reveal what occurred in this case (the 2007 case) after the filing of the information, except that the charges remained pending at the time of the 2008 search.

On July 3, 2008, based on the facts relating to the 2008 search, Sangster and Taylor were jointly charged by information with possession of methamphetamine for sale in violation of Health and Safety Code section 11378. The information filed in 2008 also alleged that Taylor was released on bail or his own recognizance when he committed the charged crime; that Sangster had two prior convictions involving controlled substances (one in San Mateo County in 2005, and a second in San Francisco County in 2007); and that Sangster had served a prior prison term and committed another crime within five years of its conclusion.

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[4] The notation said: "D. I gave you 300 (75) more. Then the 225. I would normally pay for a ball, hence, here is 450 less 75, or 375 for the last quarter."

On August 20, 2008, the prosecution moved to consolidate the 2007 and 2008 cases. Taylor's trial counsel argued in opposition, but Sangster's did not object. The trial court granted the motion, and the consolidated cases proceeded to trial before a jury.

The jury began deliberations during the afternoon on August 28. Shortly before noon on September 2, 2008, which was the next court day, it returned verdicts finding both defendants guilty of possession of methamphetamine for sale in the 2008 case, and finding Taylor guilty in the 2007 case.

Taylor waived a jury trial as to the allegation that he committed the offense charged in the 2008 case while out of custody pending trial in the 2007 case. On September 4, 2008, the trial court found that the allegation that had not been proven beyond a reasonable doubt.[5] On September 26, 2008, Taylor was sentenced to a total state prison term of 24 months. On December 10, 2008, imposition of sentence on Sangster was suspended, and she was placed on probation. Each defendant filed a timely notice of appeal.

DISCUSSION

A. Taylor's Appeal

1. In Camera Hearing re Confidential Informant

Taylor's first argument on appeal is that the trial court violated his federal constitutional rights under the Sixth and Fourteenth Amendments by excluding him and his counsel from the hearing on his motion for disclosure of the identity of the confidential informant who was the source of the information used to procure the warrant for the search of Taylor and Sangster's apartment on May 30, 2008. As appellant recognizes, this argument is foreclosed by *People v. Hobbs* (1994) 7 Cal.4th 948, 971-

[5] As the trial judge explained, the prosecution established that Taylor had been arrested and then released, but neglected to offer any evidence that his release was either on bail or on his own recognizance, which was a necessary element of the enhancement allegation.

973, which expressly authorized the procedure followed by the trial court. Accordingly, we reject this ground for Taylor's appeal.[6]

2. Review of Sealed Transcript

Both Taylor and respondent have requested that we review the sealed transcript of the in camera hearing regarding Taylor's request to reveal the identity of the confidential informant. We have done so.

The record, including the transcript of the confidential hearing, demonstrates that the court asked the relevant questions suggested by Taylor's trial counsel. The responses did not include any information indicating that the confidential informant was a material witness, i.e., that there was a reasonable possibility he or she could have given evidence on the issue of guilt that might have exonerated Taylor. (See *People v. Borunda* (1974) 11 Cal.3d 523, 527.) The informant was not a participant in or a percipient witness to any of the offenses with which Taylor was charged. (See *In re Benny S.* (1991) 230 Cal.App.3d 102, 108.) Thus, our review of the transcript does not reveal any basis for reversing Taylor's conviction based on the trial court's denial of Taylor's motion to disclose the informant's identity.

3. Violation of Taylor's Miranda *Rights*

Taylor also argues that his rights under *Miranda*, *supra*, 384 U.S. 436 were violated when the police who searched his apartment asked him for the combination to the safe without first advising him of his constitutional rights. Accordingly, he argues that his motion to suppress the statement he made in response to that question should have been granted.

As appellant acknowledges, *Miranda* warnings are not required unless the police are conducting a "custodial interrogation." (*People v. Morris* (1991) 53 Cal.3d 152, 197, disapproved on another ground by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1,

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[6] For the same reason, we reject respondent's contention that the issue was waived by appellant's trial counsel's failure to object. Any such objection would have been futile given the existence of controlling authority from the California Supreme Court. (See *People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

italics omitted.) The relevant historical facts here, as they emerged at the hearing on Taylor's motion in limine to exclude the statement, are not in dispute. Taylor was not named in the search warrant. Taylor and the men found with him in his bedroom were detained in handcuffs, and moved from Taylor's bedroom to the kitchen, while the police searched the apartment. None of them were formally placed under arrest. At the time Taylor was asked for the combination to the safe, the men had been detained only for "[a]bout a minute or so."

The trial court concluded, based on those facts, that the interrogation was not custodial, because Taylor was detained only for few minutes while the apartment was being searched. This is a conclusion of law, which we review de novo. (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1161-1162.)

" '[T]here is no hard and fast line to distinguish . . . investigative detentions from . . . de facto arrests. Instead, the issue is decided on the facts of each case, with focus on whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances. [Citations.]' [Citations.]" (*People v. Soun* (1995) 34 Cal.App.4th 1499, 1517 (*Soun*).)

In *Soun*, *supra*, 34 Cal.App.4th 1499, police officers stopped a car occupied by six young men whom they suspected might be the same group who had shot and killed a shopkeeper in a nearby city the day before. The officers were concerned that the car's occupants might be armed, or might flee on foot if they were not restrained. Accordingly, "with guns drawn, [the officers] ordered all of the occupants to get out of the car and to lie prone on the street where they were briefly pat-searched and then handcuffed." (*Id.* at p. 1513.) When "all six subjects had been handcuffed and placed in individual patrol cars, . . . the cars [were] moved to a nearby parking lot," where the men were held for about half an hour before being transported to the nearby police station. (*Id.* at pp. 1513-1514.) The Court of Appeal concluded, based on these facts, that the men "were initially detained, and that the detention did not evolve into an arrest before

the subjects were transported from the parking lot assembly area" to the local police station. (*Id*. at p. 1516.)

Respondent argues that if the facts in *Soun* amounted to a detention and not an arrest, then Taylor's brief handcuffing while his apartment was searched was also a mere detention. Taylor, in contrast, relies on *People v. Whitfield* (1996) 46 Cal.App.4th 947 (*Whitfield*). In that case, the investigating officer observed Whitfield conducting several transactions that looked like drug sales, near an apartment for which he had already obtained a search warrant. He then came back with several other police officers to execute the warrant. The officers saw Whitfield and two other women sitting in a breezeway outside the apartment building, and immediately handcuffed all three women before entering the apartment to execute the warrant. One of the officers came back out of the apartment approximately 20 to 30 seconds later, and asked Whitfield if she had any drugs on her person. She said she did, and pulled out a napkin containing cocaine base. (*Id.* at pp. 951-952.)

On Whitfield's appeal following the denial of her motion to suppress, the prosecution *conceded* that the officer's question had been a custodial interrogation, and the Court of Appeal agreed. (*Whitfield, supra*, 46 Cal.App.4th at p. 953.) Thus, the issue was not fully litigated. In any event, *Whitfield* is distinguishable. In that case, the person questioned by the officer was the target of the investigation for which the warrant had been obtained; here, in contrast, it was Sangster whose activities were detailed in the warrant affidavit, and Taylor was not a suspect until after the search was conducted. In *Whitfield*, the persons who were handcuffed were *outside* the apartment being searched. Thus, their handcuffing, unlike that of Taylor and his two companions, could not be characterized as a precautionary measure undertaken for the safety of the officers during the course of the search. Finally, the question that the officer asked in *Whitfield* was inherently self-incriminating, if answered positively. Here, the question the officer asked Taylor was designed to facilitate the execution of the search warrant, not to interrogate Taylor. If the safe's contents had been entirely innocent, Taylor's knowledge of the combination would not have had any incriminating implications.

In short, we are not persuaded by *Whitfield, supra*, 46 Cal.App.4th 947, that Taylor was subjected to custodial interrogation when he was asked for the combination to the safe. Accordingly, the officers' failure to advise Taylor of his constitutional rights before making that inquiry did not violate *Miranda*, and Taylor's motion to suppress his answer was properly denied.[7]

B. Sangster's Appeal

1. Prejudicial Effect of Joint Trial

As already noted, Taylor and Sangster were charged jointly in the 2008 case, and when the prosecution moved to consolidate the 2008 case with the 2007 case against Taylor, Sangster's trial counsel did not object. Subsequently, just prior to the start of trial, Sangster made a motion in limine seeking to introduce evidence of Taylor's uncharged arrest for methamphetamine possession in May 2007.[8] The trial court denied the motion, on the grounds that the evidence of Taylor's May 2007 arrest was more prejudicial than probative.

During a recess in the trial the following morning, which was the second day of a three-day jury trial, Sangster raised the issue whether the suppressed items from the 2008 search included the items that belonged to the other two men who were in the apartment at the time, as well as the things that belonged to Taylor. The trial court interpreted the ruling granting the motion to suppress as including the items seized from Taylor's visitors as well as Taylor's own belongings, and declined to revisit that ruling.

As part of the colloquy on that subject, Sangster's trial counsel opined that Sangster's case should be severed from Taylor's, arguing that Sangster's defense was

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[7] Because we have resolved this issue on the merits in resopndent's favor, we need not address respondent's alternative argument that if there was error, it was harmless. We agree with respondent, however, that given Taylor's testimony that he had given the combination to Sangster, his own continuing knowledge of the combination was not probative on the issue whether the safe's contents belonged or even were known to him.

[8] The charges arising from this arrest were apparently dismissed due to the prosecution's refusal to disclose the identity of a confidential informant.

prejudiced by the exclusion of the suppressed items. The trial court responded that the issue should have been raised in conjunction with Taylor's motion to suppress, and declined to revisit it.

Sangster now characterizes the trial court's action as the denial of a motion to sever her case from Taylor's.[9] She argues that this ruling violated her rights under the confrontation clause, because the exclusion of the suppressed items from evidence at the joint trial curtailed her ability to cross-examine Taylor about his disclaimer of any knowledge of the drugs and money found in the safe, and his assertion that he had stopped dealing drugs after his arrest in the 2007 case. In the alternative, she argues that the trial court's refusal to sever her case constituted an abuse of discretion.

With respect to Sangster's confrontation clause argument, respondent points out that Sangster did not raise this argument as a ground for severing in the trial court. Sangster's reply brief concedes this, but argues that this court should consider the argument anyway.

Even if we were to do so, however, we would find no reversible error, even if error is assumed. As a result of the consolidation of the 2007 and 2008 cases, the jury heard ample evidence that Taylor had been involved in dealing methamphetamine well before Sangster moved into his apartment. In addition, the trial court admitted into evidence the scales found in plain view in Taylor's bedroom during the 2008 search, and the envelope with his note to Sangster regarding a methamphetamine transaction between them. Through this evidence, the jury had before it evidence that Taylor remained in the methamphetamine business in 2008. Indeed, the evidence was sufficient to persuade the jury to convict Taylor as well as Sangster in the 2008 case. Thus, the evidence that

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[9] For the sake of argument, we accept Sangster's characterization of her trial counsel's remarks as amounting to motion to sever. In doing so, we are being charitable. Sangster's trial counsel stated that she felt that the two defendants should be tried separately, and that Sangster's defense was being prejudiced by her inability to present the suppressed evidence to the jury, but did not expressly request any relief on that basis. By that point in the trial, the court would have had to declare a mistrial in order to grant such relief. Sangster's counsel did not move for a mistrial, however.

Sangster now says she should have been able to use in cross-examining Taylor would merely have been cumulative of evidence that was already available to her for that purpose.

Accordingly, we are persuaded by respondent's argument that even if the denial of severance violated her rights under the confrontation clause, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 36.) A fortiori, even if the trial court abused its discretion in denying what Sangster now characterizes as a motion to sever, any error was harmless under the *Watson* standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. Prosecutorial Misconduct in Closing Argument

In closing argument, after arguing that the evidence from the 2008 search indicated that Taylor and Sangster were "in business together," and commenting on Taylor's relatively comfortable lifestyle, the prosecutor remarked: "We've heard nothing about Ms. Sangster, other than that she had knee problems and she had caregivers and that she had keys that, according to Mr. Taylor, may have been passed around to other friends." Sangster now argues that this constituted an improper comment on her post-arrest silence and decision not to testify. (See generally *Doyle v. Ohio* (1976) 426 U.S. 610.)

Sangster acknowledges that her trial counsel did not object contemporaneously to the challenged statement by the prosecutor, but argues that the issue is not subject to forfeiture. For this proposition, she cites a federal case from outside the jurisdiction, *Bass v. Nix* (8th Cir. 1990) 909 F.2d 297, overruled on another ground by *Brecht v. Abrahamson* (1993) 507 U.S. 619, and a case from this court, *People v. Evans* (1994) 25 Cal.App.4th 358, 369-370. Neither of these cases supports Sangster's position on the waiver issue, because in both cases, the defendant's trial counsel promptly objected to the prosecution's improper questioning, but was overruled. (*Bass v. Nix, supra,* 909 F.2d at p. 300; *People v. Evans, supra,* 25 Cal.App.4th at pp. 366-367; see also *id.* at p. 368,

fn. 5.)[10] Indeed, as respondent points out, the law in California is to the contrary. (*People v. Riggs* (2008) 44 Cal.4th 248, 298-299; *People v. Crittenden* (1994) 9 Cal.4th 83, 146-147; see also *People v. Gionis* (1995) 9 Cal.4th 1196, 1215 ["Generally, a reviewing court will not review a claim of [prosecutorial] misconduct in the absence of an objection and request for admonishment at trial. 'To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.' "].)

Even considering the issue on the merits, and even construing the prosecutor's ambiguous remark as a comment on Sangster's post-arrest silence and failure to testify, we find no basis to reverse Sangster's conviction. Given the overall state of the evidence, including the quantity of methamphetamine and money found in the safe, as well as Taylor's testimony that the note on the envelope reflected a purchase of methamphetamine that he had made from Sangster, the prosecutor's allusion to the relative lack of evidence regarding Sangster was harmless beyond a reasonable doubt. (See *People v. Earp* (1999) 20 Cal.4th 826, 855-858; *Williams v. Zahradnick* (4th Cir. 1980) 632 F.2d 353, 360-361 [improper prosecutorial comment on defendant's post-arrest silence does not require reversal if error is harmless beyond a reasonable doubt].)

[10] The opinion in *People v. Evans*, *supra*, does note that a defendant's decision to testify at trial does not waive the defendant's right to be free from any comment by the prosecution on the defendant's decision not to respond to police questioning after the defendant's arrest. (25 Cal.App.4th at pp. 369-370.) That is a different issue, which is not presented by the facts of this case.

DISPOSITION

The judgments against both appellants are affirmed.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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SEPULVEDA, J.